Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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First Assembly of God of
Naples, Florida, Inc., *Petitioner,*

*v.*

Collier County, a political subdivision
of the State of Florida, *Respondent.*

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a law that conditions use of a "church" on the judgment of government officials that a particular religious use is "customary" fails Free Exercise Clause scrutiny unless it is narrowly tailored to advance a compelling state interest.

2. Whether the Court of Appeals' judgment should be vacated for further proceedings in light of the Religious Freedom Restoration Act of 1993.

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# PETITION FOR A WRIT OF CERTIORARI

First Assembly of God of Naples, Florida, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 5, 1994, and modified on August 3, 1994.

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## OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit (App.A-1-14 and B-1-3) are reported at 20 F.3d 419 and at 27 F.3d 526. The Order of the United States District Court for the Middle District of

Florida denying petitioner's motion for preliminary injunction (App.C-1-18) is reported at 775 F. Supp. 383. The Order of the district court entering summary judgment in favor of respondent (App.D-1-10) and the Report and Recommendation of the Magistrate Judge adopted therein (App.E-1-16) are unreported.

## JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on May 5, 1994, and modified its opinion, denied a petition for rehearing, and denied a suggestion for rehearing en banc on August 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

U.S. Const., Amend. XIV, sec. 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (1993) (reproduced in full at App.F-1-4).

Collier County Zoning Ordinance No. 82-2 (reproduced in relevant part at App.G-1-2).

Collier County Zoning Ordinance No. 91-34 (reproduced in relevant part at App.H-1-5).

## STATEMENT OF THE CASE

In this case, officials of Collier County, Florida, authorized establishment of a church on certain property within the county, but then prohibited the use of that church for a shelter ministry to the homeless, based solely on those officials' judgment that such a ministry is not a "customary" use of a church. First Assembly of God is a Christian Church located in a district zoned "RMF-6" (multi-family residential) in 1982, pursuant to Collier County Zoning Ordinance No. 82-2. (App.A-3-4.) In 1983, First Assembly of God was granted a provisional use permit pursuant to that portion of Ordinance No. 82-2 creating a "special exception" for "churches." (App.C-2-3; App.A-11.) The ordinance defines a "church" as "[a] building used as a place of worship and religious education, and for customary accessory uses, by a body or organization of religious believers." (App.G-2.) First Assembly of God constructed various buildings on its property, including one which it used, without objection from Collier County authorities, as a day care center. (App.A-3.) In November 1990, in furtherance of its religious mission, First Assembly of God converted the building formerly used as a day care center into use as a shelter for homeless persons. (App.C-3; Record Excerpts EX8, 2, App.I-2.)

In proceedings that began in April 1991 and concluded in August 1991, the Collier County Zoning Code Enforcement Board determined that First Assembly of God's use of its building to shelter the homeless was

unlawful, because "a homeless shelter is not a customary accessory use to a church under Ordinance No. 82-2." (Record Excerpts EX8, 3, App.I-4.) The Board relied for this conclusion on a written interpretation of the ordinance by the county's Zoning Director. (Record Excerpts EX8, 4-5, App.I-5.) In the written interpretation relied upon, the Director stated:

> "The existence of a homeless shelter is not allowed as it is not a customary accessory use. The American Heritage Dictionary defines 'Customary' 1. commonly practiced or used as a matter of course; usual.'"

(Record Excerpts EX6, App.J-1; emphasis in original.) In addition to consulting the dictionary, the Director also "arrived at the opinion that the homeless shelter is not a accessory use of the church by reviewing the permitted principal uses within the district and the accessory uses and taking into consideration that the use is for a church." (Record Excerpts EX7, 2.)

The county ordered First Assembly of God to cease using its church property to shelter homeless persons, on penalty of paying $250 per day fines. (App.A-4.) Contemporaneously, the Board of Commissioners of Collier County adopted Collier County Zoning Ordinance No. 91-34, which classifies a homeless shelter as a "group care facility." (App.H-4-5; Record Excerpts EX6, App.J-1.) Group care facilities are barred from RMF-6 districts absent approval as a provisional use by the Board of Commissioners. (*Id.*) As a result of the county's actions, First Assembly of God was forced to close the homeless

shelter. (App.C-4.)

On August 14, 1991, First Assembly of God and individual homeless persons sheltered by it filed the instant action for declaratory and injunctive relief, alleging, *inter alia*, that the Collier County ordinances in question, both on their face and as applied to First Assembly of God, violate the church's right to the free exercise of religion as guaranteed by the First and Fourteenth Amendments to the United States Constitution. First Assembly of God did not invoke the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (1993) (App.F-1-5), because that Act did not become law until November 16, 1993. After denying petitioner's motion for a preliminary injunction on October 4, 1991 (App.C-17), the district court on March 17, 1993, entered summary judgment in favor of Collier County on all counts. (App.D-9.) On May 5, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision. (App.A-14.) On August 3, 1994, the Court of Appeals modified its May 5, 1994 opinion to add the following footnote:

> "We observe that the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. §§ 2000bb to 2000bb-4, may apply to this case. However, since it was not raised by either party, we decline to discuss it."

App.B-2. The Court of Appeals then denied rehearing and denied rehearing en banc. (*Id.*)

In affirming the district court's decision, the Court of Appeals dismissed First Assembly of God's Free

Exercise Clause challenge to Ordinance No. 82-2 in just three sentences, without citation to any authority. The court did not challenge First Assembly of God's assertion that "sheltering the homeless is a central, essential element of the Christian religion . . ." App.A-11. Nevertheless, despite the fact that Ordinance No. 82-2 specifically addresses "churches" and allows a church to engage only in those ministries a local official determines to be "customary," the Court of Appeals held that the ordinance "is neutral on its face and is of general applicability," and, therefore, "simply does not implicate the Free Exercise Clause." *Id.* Indeed, the Court of Appeals asserted that Ordinance No. 82-2 was not even "really in question here." App.A-12.[1/]

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[1/] The Court of Appeals held that Ordinance No. 91-34, regulating homeless shelters as group care facilities, was "really in question," but concluded that it does not violate the Free Exercise Clause. App.A-14. Whether Ordinance No. 91-34 violates the Free Exercise Clause is not a question presented by this Petition.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT OF APPEALS COMMITTED FUNDAMENTAL ERROR IN ITS TREATMENT OF AN IMPORTANT FREE EXERCISE CLAUSE QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

#### A. THE COURT OF APPEALS' REFUSAL TO SUBJECT TO ANY FREE EXERCISE CLAUSE SCRUTINY A LAW VESTING LOCAL OFFICIALS WITH DISCRETION TO DISALLOW USE OF A "CHURCH" FOR ANY BUT "CUSTOMARY" RELIGIOUS ACTIVITIES WAS FUNDAMENTALLY ERRONEOUS.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ."

*West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

In this case, the officials of a Florida county refused to allow a church to engage in its religious mission -- on property the county specifically authorized for use as a "church" -- based solely on those officials' judgment that the particular mission, sheltering the homeless, is not a "customary" use of a church. Confronted with what could hardly be a more dramatic example of state officials

prescribing what is "orthodox" in religion, [2/] the Court of Appeals curtly opined that this state action "simply does not implicate the Free Exercise Clause." App.A-11. If permitted to stand, the Court of Appeals' refusal even to acknowledge the application of First Amendment principles here would constitute a wholesale abdication of the abiding obligation of federal courts to safeguard religious liberty.

The Court of Appeals' decision effectively repudiates at least three distinct lines of this Court's Free Exercise Clause jurisprudence.

### 1. Local Officials May Not Be Vested With Standardless Discretion to Permit or Prohibit Religious Activities.

From the very first case in which it applied the Free Exercise Clause to the States under the Fourteenth Amendment, this Court has unreservedly condemned laws which vest local officials with unfettered discretion to permit or prohibit religious activity based on those officials' judgment of whether the activity is "religious". In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court invalidated a Connecticut statute prohibiting solicitation of funds for a religious cause except where a state official, in "the exercise of judgment, and the formation of an

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[2/] "Customary" is a synonym for "orthodox." *See* R.L. Chapman, *Roget's International Thesaurus* (4th ed. 1977) § 645.5 ("Social convention" adjectives: "orthodox," "customary").

opinion," determined that "such cause is a religious one." *Id.* at 305, 302. The Court unanimously held that to condition this religious activity "upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.* at 307. So here, once having permitted First Assembly of God to establish a "church" on its property, Collier County may not consign to the standardless discretion of local officials the question of what religious practices may be pursued in furtherance of the mission of that church.

That the discretion vested by Collier County in its officials is, in fact, standardless, is revealed by the Zoning Director's own explanation of how he concluded that sheltering the homeless was not a "customary" use of a church. He looked up the definition of "customary" in a dictionary, found that it meant "commonly practiced" or "usual," and then looked around the district in which First Assembly of God is located and found that no other churches there were sheltering the homeless. (Record Excerpts EX6, App.J-1; Record Excerpts EX7, 2.) That the Zoning Director had to seek guidance from a dictionary, and confined his application of the concept of "common" or "usual" to one neighborhood of his locality exemplifies precisely the kind of arbitrary and parochial

decisionmaking *Cantwell* and its progeny forbid.[3/]

### 2. Government May Not Discriminate Between Conventional and Unconventional Religious Practices.

That Collier County vests its officials with discretion to decide which religious practices a church may or may not pursue on its property is alone sufficient to run afoul of the Free Exercise Clause. But even were no discretion involved, the test for approval employed by the county would doom Ordinance No. 82-2 under well-settled First Amendment principles. Collier County does not condition enjoyment of its exception for "church" uses on the basis of whether a particular use threatens public health, safety, or order, or even on the basis of aesthetics. Rather, the inquiry engaged in by the county -- and used to thwart First Assembly of God's religious mission here -- is whether the religious practice is "customary." This popularity or conventionality test is utterly repugnant to the First Amendment.

As this Court has very recently reaffirmed, "'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion,' . . . favoring neither one religion over others nor religious adherents

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[3/] Had the Zoning Director looked beyond Collier County, he would have found that sheltering the homeless, is, in fact, quite a "common" or "usual" use of a church. *See* Section I-B-2, *infra*.

collectively over nonadherents." *Board of Education of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2487 (1994) (citation omitted). This means not merely that "government may not . . . discriminate among persons on the basis of their religious beliefs and practices," *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989), but, more pertinently, that government may not disfavor particular religions because of their minority status or the unpopularity of their practices.

More than four decades ago, in *Fowler v. State of Rhode Island*, 345 U.S. 67 (1953), this Court held that the City of Pawtucket, Rhode Island, could not allow some religious groups to conduct services in a city park but not the Jehovah's Witnesses. The Court specifically acknowledged that the Jehovah's Witnesses had "conventions that are different from the practices of other religious groups," *id.* at 69 -- *i.e.*, they were not "customary". "But," declared this Court, "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *Id.* at 70. Neither is it the business of county boards.

This Court expressly its hostility to denominational preferences most forcefully in *Larson v. Valente*, 456 U.S. 228 (1982). "The clearest command of the Establishment Clause," the Court declared, "is that one religious denomination cannot be officially preferred over another." *Id.* at 244. "This constitutional prohibition," the Court continued, is also "inextricably connected with the

continuing vitality of the Free Exercise Clause" because

> "Madison's vision -- freedom for all religion being guaranteed by free competition between religions -- naturally assumed that every denomination would be equally at liberty to *exercise* and propagate its beliefs."

*Id.* at 245 (emphasis supplied).

The Minnesota statute at issue in *Larson* exempted from registration and disclosure requirements the solicitation activities of *certain* religious organizations -- those that "received more than half of their total contributions from members or affiliated organizations." *Id.* at 231-32. While the discriminatory impact of this classification was far subtler than Collier County's explicit distinction between "customary" and noncustomary church uses, this Court had no difficulty in discerning the Minnesota statute's constitutionally fatal flaw:

> "[T]he provision effectively distinguishes between 'well-established churches' that have 'achieved strong but not total financial support from their members,' on the one hand, and 'churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members,' on the other hand."

*Id.* at 246 n.23, *quoting Larson v. Valente*, 637 F.2d 562, 566 (8th Cir. (1981). Because the statute favored "well-established" churches over newer or more novel ones, the Court held, it could be sustained only if it was "closely

fitted to further" a "compelling governmental interest." *Id.* at 247. The statute could not withstand that scrutiny.

Finally, this Court's most recent Free Exercise Clause decision, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217 (1993), confirms that the First Amendment protects from official discrimination not merely "unconventional" (*Fowler*) or not "well-established" religious practices (*Larson*), but even practices "that may seem abhorrent to some" -- such as animal sacrifice. *Id.* at 2225. Given this long-standing and emphatic hostility toward discrimination against even the most reviled minority religious practices, for the Court of Appeals to have declared here that the Free Exercise Clause is not even *implicated* by discrimination against religious practices that are merely non-"customary" plainly flouts fundamental First Amendment doctrine.[4/]

### 3. A Law That Specifically Targets Religion and Employs A System of Exemptions Is Not "Neutral and of General Applicability."

The Court of Appeals conclusorily asserted that Collier County's denial of the benefits of the "special

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[4/] Limiting churches to uses that are "customary" is offensive to the First Amendment for an additional reason, beyond its discrimination against minority faiths. Employment of such a test effectively stifles the development of new expressions of faith even by well-established majority religions. A religious practice that is new and previously untried can never be "customary." Surely the First Amendment must stand against a prohibition on experimentation or innovation in religious practice.

exception" for "churches" to church activities deemed not "customary" is a "neutral" law of "general applicability" -- thus, in that court's view, obviating the need for *any* Free Exercise Clause scrutiny. App.A-11-12. But the Court of Appeals' assertion is flatly inconsistent with this Court's explication of the concept of religiously "neutral" laws of "general applicability" in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217 (1993).

First, the closing of First Assembly of God's shelter ministry is not "merely the incidental effect of a generally applicable and otherwise valid provision." *Smith*, 494 U.S. at 878. Rather, it is the application of a provision that specifically and explicitly governs the use of a "church," defined as "[a] building used as a place of worship and religious education, and for customary accessory uses, by a body or organization of religious believers." (App.G-2.) By its explicit targeting of "churches" for regulation, the provision in question is manifestly *not* "neutral" under this Court's plain language in *Lukumi Babalu*: "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi Babalu*, 113 S.Ct. at 2227.

Moreover, unlike the category of Free Exercise Clause claims exemplified by *Smith*, the instant case is not one in which the church seeks *judicial* imposition of an exemption from a state law. Rather, here the *ordinance* establishes a "special exception" for "churches," but then

proceeds to limit the benefits of that exemption to those church activities that local officials deem "customary." This ordinance, then, falls within the pre-*Smith* rule reaffirmed in both *Smith* and *Lukumi Babalu* that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. *Accord, Lukumi Babalu*, 113 S.Ct. at 2229. A law like the ordinance at issue here, that discriminates *between* religious practices in extending the benefits of an exemption, fails the "neutral and generally applicable" test even more miserably than does a law that discriminates *against* religious practices.[5/] And, of course, "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi Babalu*, 113 S.Ct. at 2226.

Because Collier County has denied First Assembly of God the benefits of a religious exemption the county itself established, the Court of Appeals, instead of declining to engage in any Free Exercise Clause scrutiny at all, should *at least* have subjected the ordinance and its specific application here to compelling interest scrutiny. This is illustrated by this Court's decision in *Bob Jones*

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[5/] *Compare, e.g., Washington Ethical Society v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957) (Burger, J.) ("To construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to the majority beliefs might well raise constitutional issues").

*University v. United States*, 461 U.S. 574 (1983). In *Bob Jones*, a religious university was stripped of its "religious, charitable . . . or educational" exemption from federal taxation on the basis of racial discrimination which the university engaged in "on the basis of sincerely held religious beliefs." *Id.* at 602. This Court upheld the withdrawal of the exemption, but only after engaging in a compelling interest analysis. Withdrawal of the exemption did not violate the Free Exercise Clause, the Court held, because the government's interest in "eradicating racial discrimination in education" was "compelling," and because "no less restrictive means" than withdrawing the exemption were "available to achieve the governmental interest." *Id.* at 604.

Ultimately, it will be demonstrated that Collier County's interest in limiting the uses of churches to those its functionaries deem "customary" is anything but compelling. But that requires as a first step that the federal courts appropriately *scrutinize* the ordinance and its application, as, until now, they have refused to do. Under this Court's well-settled Free Exercise Clause doctrine, the Court of Appeals' decision must be reversed.

## B. THE FREE EXERCISE QUESTION PRESENTED HERE IS AN IMPORTANT QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

### 1. Zoning Laws Commonly Employed Throughout The Nation That Give Local Officials Discretion to Stifle Non-"Customary" Religious Activity Must Not Escape Free Exercise Clause Scrutiny.

Any assessment of the importance of the Free Exercise question presented here must begin with a recognition of what questions this Petition does *not* present. Neither the validity of zoning ordinances that limit the location of churches, nor even of those that preclude churches from engaging in publicly harmful activities at those locations, is questioned here. Rather, the question here presented is whether, consistent with the requirements of the Free Exercise Clause, local zoning officials may be accorded free rein to disallow a particular religious use of a property already zoned to be a "church," solely because that use fails to comport with those officials' sense of what is "customary." This question, one of first impression in this Court, is of the utmost importance, both in its geographic scope and its doctrinal significance.

Geographically, Collier County's limitation of churches to their "principal uses" (*e.g.*, worship), plus "accessory uses," reflects a typical treatment of churches in

American zoning ordinances:

> "An accessory use arises when an area is zoned for residential use only, with a specific exception included for churches. The exception permits property in the zoned area to be used for religious worship, and for activities deemed 'accessory' to religious worship . . ."

Note, *Land Use Regulation and the Free Exercise Clause*, 84 Colum. L. Rev. 1562, 1568 n.39 (1984). *See also* 83 Am. Jur. 2d *Zoning and Planning* § 437 (1992) ("The right to establish and maintain a religious use includes the right to establish and maintain uses which are accessory to it"); J.M. Zitter, Annotation, *What Constitutes Accessory or Incidental Use of Religious or Educational Property Within Zoning Ordinance*, 11 A.L.R. 4th 1084, 1086 (1982) (same; citing 2 Anderson, *American Law of Zoning*, 2d Ed. § 12.26).

While not all zoning ordinances use the word "customary" as an explicit modifier to "accessory" (as the Collier County ordinance does), the concept of "customariness" is a standard element of the definition of "accessory use." *See, e.g., Redfearn v. Creppel*, 455 So.2d 1356, 1360 (La. 1984) (zoning ordinances defining "accessory uses" "almost always state" that "[t]hey must be *customarily* incidental"; quoting 3A Williams, *American Land Planning Law* § 74.08 [1975]; emphasis in original); *Lawrence v. Zoning Board of Appeals*, 158 Conn. 509, 512, 264 A.2d 552, 554 (1969) ("The crucial phrase 'customarily incidental' is typically present" in zoning ordinances

defining "accessory use"; citing 1 Anderson, *American Law of Zoning* § 8.26); 101A C.J.S. *Zoning & Land Planning* (1979) § 148 and supp. (1994) ("A use is 'accessory' when, and only when, it is customarily incident to the main use"; citing decisions from 12 states); 83 Am. Jur. 2d *Zoning and Planning* § 224 (1992) and supp. (1994) ("An accessory use has been defined as a subordinate use, customarily incident to the principal use"; citing decisions from five states); 2 Ziegler, *Rathkopf's The Law of Zoning & Planning* § 23.01 (1991) ("An 'accessory use' is a use which is clearly incidental to and customarily found in connection with and located on the same zoning lot as the principal use to which it is related"). *See generally* Note, *Zoning: Accessory Uses and the Meaning of the "Customary" Requirement*, 56 B.U. L. Rev. 542-557 (1976).

Thus, the limitation Collier County purports to impose on the lawful uses of a church is a limitation to which many churches throughout the nation are subject. Reversal of the Court of Appeals' decision will remove a threat to churches nationwide that their ministries may be disallowed based on some local official's notion of what is "customary."

Doctrinally, permitting a federal appellate court to declare that the Free Exercise Clause is not even "implicated" by a law that conditions the freedom to pursue a particular religious practice on conformity with some state official's idea of what is normal or "customary" strikes at the very essence of American religious liberty. Attaching significance, much less primacy, to what is

standard, normal, common, or "customary" in regulating the exercise of religion is antithetical to the purposes for which the First Amendment religion clauses were enacted. As this Court observed more than a century ago, the Framers sought specifically to avoid the tragic European experience of enforced conformity in religious expression:

> "The oppressive measures adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages, *to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect*, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward *conformity to a prescribed standard*, led to the adoption of the [First] amendment."

*Davis v. Beacon*, 133 U.S. 333, 342 (1890) (emphases supplied). The enactment of the First Amendment religion clauses further reflects the Framers' appreciation for the new nation's religious diversity:

> "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the *lack of any one religious creed on which all men would agree.* They fashioned a charter of government which envisaged the *widest possible toleration* of conflicting views."

*United States v. Ballard*, 322 U.S. 78, 87 (1944) (emphases supplied).

Among such variety of religion, there can be no

"norm" from which those whose faith directs them otherwise can be prohibited to stray. To let stand a federal appellate decision that asserts to the contrary would be fundamentally inconsistent with this Court's duty to serve as the supreme defender of American religious freedom.

### 2. The Life-Sustaining Contribution of Persons of Faith to Meeting The Needs of the Homeless Must Not Be Chilled.

While Collier County's Zoning Director may have been able to find only one church sheltering the homeless in that locality, the reality in the nation as a whole is that churches in recent years have filled a critical void in meeting the need of the homeless for emergency shelter. While most of this church shelter activity has not been compiled in published data, news accounts have reported that at least 25 churches in Michigan, 50 churches in New York, and more than 60 churches in Illinois have opened their doors to the homeless. *See* Judy Daubenmier, *Michigan's Movable Shelters Give Aid, Comfort to the Down and Out, Homeless: Some Churches Take Turns Hosting the Operation*, L.A. Times, March 21, 1993, at A32 (App.K-1-2) (noting 25 Michigan churches, 50 New York churches sheltering the homeless; "'It's definitely all over the country,' said Robert Ogilvie, director of volunteers for the Partnership for the Homeless"); Colin McMahon, *Church, City At Odds Over Homeless, Chicago Tribune*, Jan. 16, 1991, at B2 (App.L-3) (noting that "more than 60

churches in 38 communities in Northern Illinois" provide nights of shelter to the homeless). Courts have also taken note of this phenomenon. *See, e.g., Trinity United Methodist Church v. City of Kingston Zoning Board of Appeals*, Calendar No. 90, slip op. at p. 4 (N.Y. Sup. Ct. Ulster County, Aug. 11, 1983) (App.M-4) ("many churches throughout the area have instituted programs to provide temporary emergency shelter for indigents").

As in Collier County, many of these church shelter ministries have come into conflict with local zoning ordinances. *See, e.g., Greentree At Murray Hill Condominium v. Good Shepherd Episcopal Church*, 146 Misc. 2d 500, 550 N.Y.S.2d 981, 986 (N.Y. Sup. Ct. New York County 1989) (recognizing homeless shelter as accessory use of a church); *St. John's Evangelical Lutheran Church v. City of Hoboken*, 195 N.J. Super. 414, 479 A.2d 935, 938 (L. Div. 1983) (same); *Trinity United Methodist Church* (App.M-4), *supra* (same); Colin McMahon, *Church, City At Odds Over Homeless*, Chicago Tribune, Jan. 16, 1991, at B2 (App.L-1-5), *supra*.

The Court of Appeals' decision here (and the district court judgment it affirmed) are the first federal court decisions to address the extent to which the Free Exercise Clause protects church shelter ministries from being barred as non-"customary" by local zoning authorities. If the Court of Appeals' decision is permitted to stand -- meaning the only federal decisional law declares that bans on these ministries do not even "implicate the Free Exercise Clause," App.A-11 -- this

could well chill the establishment of any new shelters for the homeless in churches, and perhaps even lead to the closing of some that have already operated without incident for years. Such a limit to or reduction in the already-inadequate resources available for emergency shelter could have devastating consequences for the homeless persons affected. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting) ("The detrimental effects of homelessness are manifold and include psychic trauma, circulatory difficulties, infections that refuse to heal, lice infestations, and hypothermia. . . . In the extreme, exposure to the elements can lead to death"; citing Brief for National Coalition for the Homeless as *Amicus Curiae*, at 14-15).

It is important, then, that this Court reverse the Court of Appeals to let churches throughout the nation know that they need not cease their ministry to the homeless, that these life-sustaining expressions of their faith *are* protected by the First Amendment.

## II. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT THE WRIT IN ORDER TO VACATE THE JUDGMENT BELOW FOR FURTHER PROCEEDINGS IN LIGHT OF THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993.

Should this Court decline to address the Free Exercise Clause issue presented by this Petition, First Assembly of God requests that this Court nevertheless

grant the prayed-for writ of certiorari, in order to vacate the Court of Appeals' judgment for further proceedings in light of the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141 (1993) (App.F-1-4). Assuming, *arguendo*, that Collier County Zoning Ordinances Nos. 82-2 and 91-34 are neutral laws of general applicability, their application to First Assembly of God should still be subjected to compelling interest scrutiny under RFRA. RFRA provides, in relevant part, that:

> "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person --
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest."

App.F-2, sec. 3(b).

The Court of Appeals correctly suggested the applicability of RFRA to this case. App.B-2. RFRA states on its face that it "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and *whether adopted before or after the enactment of this Act*." App. F-4, sec. 6(a) (emphasis supplied). Applying this plain language, all courts to examine the question have held that RFRA applies to events preceding its enactment. *See, e.g., Brown-El v. Harris*, 26 F.3d 68 (8th Cir. 1994); *Campos v. Coughlin*,

854 F. Supp. 194 (S.D. N.Y. 1994); *Rust v. Clarke*, 851 F. Supp. 377 (D. Neb. 1994); *Allah v. Menei*, 844 F. Supp. 1056 (E.D. Pa. 1994); *Lawson v. Dugger*, 844 F. Supp. 1538 (S.D. Fla. 1994).

The Court of Appeals nevertheless "declined" to apply RFRA to this case, citing the failure of the parties to raise it. App.B-2. The Court of Appeals was not at liberty to so decline. While RFRA had not yet been enacted when this case was filed, or even when the briefs were filed with the Court of Appeals, as of the date of the Court of Appeals' decision (May 5, 1994), RFRA had been the law of the land for almost six months. It is the obligation of a federal court to "apply the law in effect at the time it renders its decision." *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1501, quoting *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). Certainly, at least where, as here, a law enacted subsequent to the events giving rise to the suit is "unambiguous" in its application to such events, *Landgraf, supra*, that "law must be obeyed." *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801) (appellate court required to apply statute enacted while appeal pending).

Because RFRA, as well as the Free Exercise Clause, protects First Assembly of God's right to have application of the challenged ordinances subjected to the most searching review, this Court should vacate the Court of Appeals' judgment and remand this case to the Court of Appeals to conduct that review.

## CONCLUSION

The petition for a writ of certiorari should be granted. If this Court declines to address the Free Exercise Clause question presented, then the judgment of the Court of Appeals should be vacated for further proceedings in light of the Religious Freedom Restoration Act of 1993.

Respectfully submitted,

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